BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

DELTA-MONTROSE ELECTRIC ASSOCIATION,	)	
	)	
COMPLAINANT	)	
	)	
v.	)	**PROCEEDING NO. 18F-0866E**
	)	
TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,	)	
	)	
RESPONDENT.	)	

RESPONSE TO MOTION OF
THE COLORADO ENERGY OFFICE
TO INTERVENE OUT OF TIME

Pursuant to the Colorado Public Utilities Commission ("Commission") Rules of Practice and Procedure, 4 CCR 723-1-1308(a) and 4 CCR 723-1-1400(b), Tri-State Generation and Transmission Association, Inc. ("Tri-State") responds to the motion of the Colorado Energy Office ("CEO") to Intervene Out of Time Or, In the Alternative, For Leave to Participate As *Amicus Curiae* ("Motion"). CEO requests to intervene in this proceeding, either as a matter of right or permissively, or in the alternative, to participate in the proceeding as an *amicus*.

Tri-State opposes CEO's request to intervene on the grounds that intervention would be inconsistent with CEO's statutory mandate under C.R.S. § 24-38.5-101(1) and that CEO has not asserted an interest sufficient to support intervention under either Rule 1401(b) or (c). With respect to CEO's request to participate as an *amicus*, Tri-State is not in a position to determine whether such participation would be useful to the Commission (and therefore, whether it should be

allowed). If CEO is allowed to participate as an *amicus*, however, it must be limited to legal argument consistent with its motion under Rule 1200(c).

PROCEDURAL BACKGROUND

On December 6, 2018, Delta-Montrose Electric Association filed a complaint requesting, among other things, that the Commission establish an "exit charge" for it to terminate its Wholesale Electric Power Contract ("WESC") with Tri-State. The deadline for filing interventions was January 9, 2019. CEO filed its Motion on January 22, 2019.

LEGAL STANDARD

CEO has a statutory right to intervene under C.R.S § 40-6-108(2)(b) "upon a timely filing of a petition . . . in adjudicatory matters affecting gas or electric utilities . . . " Absent a timely filing, CEO must show good cause to be granted late intervention under Rule 1401(a) and must also show either a "legally protected interest" under Rule 1401(b) or meet the standard for permissive intervention under Rule 1401(c). Except where a party may intervene in a Commission proceeding as a matter of right, the Commission has discretion in deciding whether to grant permission to intervene. Rule 1401(c) states as follows:

> A motion to permissively intervene shall state the specific grounds relied upon for intervention; the claim or defense within the scope of the Commission's jurisdiction on which the requested intervention is based, including the specific interest that justifies intervention; and why the filer is positioned to represent that interest in a manner that will advance the just resolution of the proceeding. The motion must demonstrate that the subject proceeding may substantially affect the pecuniary or tangible interests of the movant (or those it may represent) and that the movant's interests would not otherwise be adequately represented. If a motion to

> permissively intervene is filed in a natural gas or electric proceeding by a residential consumer, agricultural consumer, or small business consumer, the motion must discuss whether the distinct interest of the consumer is either not adequately represented by the OCC or inconsistent with other classes of consumers represented by the OCC. The Commission will consider these factors in determining whether permissive intervention should be granted. Subjective, policy, or academic interest in a proceeding is not a sufficient basis to intervene.

A person seeking permissive intervention must establish a pecuniary or tangible interest that may be substantially affected by the outcome of the proceeding. *See, e.g.*, Decision No. C14-0889, at ¶¶ 8-9, Proceeding No. 14A-0491G (July 29, 2014). In addition, the permissive intervenor must state the claim or defense within the scope of the Commission's jurisdiction that the requested intervention is based upon. It is the movant's obligation to demonstrate its interest in the proceeding, and the Commission will not guess or speculate as to the grounds supporting intervention. Docket No. 08S-520E, Decision No. R08-1349 at ¶ 13.

A non-party who wishes to participate as an *amicus* must identify (1) why the non-party has an interest in the proceeding, (2) the issues the non-party will address through argument, and (3) why the legal argument may be useful to the Commission. Rule 1200(c). An *amicus* may present only legal arguments. *Id.* Requests for amicus curiae status may be accepted or declined at the Commission's discretion. *Id.*

RESPONSE

CEO should not be granted leave to intervene because it has not established a "legally protected right that may be affected by the proceeding" under Rule 1401(b) or a sufficient interest to support permissive intervention under Rule 1401(c). While

CEO argues it has good cause to intervene late based on the recent appointment of its new director, it must *also* meet the standard for intervention under either Rule 1401(b) or Rule 1401(c).

In support of its request either for intervention as of right or permissive intervention, CEO cites its statutory authority to promote "clean and renewable energy," "energy efficiency technologies and practices," and "energy storage systems."[1] (CEO Mot. ¶ 6-7.) It also cites its mandate to "[l]ower long-term consumer costs."[2] (CEO Mot. ¶ 6-7).

These statutory duties are not implicated in this proceeding, which concerns the terms and conditions under which DMEA may withdraw from Tri-State and terminate its obligations under the WESC. While DMEA states in its Complaint that it intends to pursue additional renewable energy, this proceeding will not adjudicate DMEA's future generation mix. Indeed, DMEA does not seek, nor could the Commission grant,[3] approval of a particular DMEA generation mix. While it may be true that DMEA desires to pursue such generation, this proceeding will not have any binding effect on whether DMEA actually does so (unlike, for example, the Commission's consideration of an investor-owned utility's electric resource plan).

CEO also attempts to ground its intervention in the notion that it has a duty to seek lower rates for DMEA's customers. (CEO Mot. at ¶ 6 ("CEO's participation in this proceeding will further its mandate of "lower[ing] long-term consumer costs" for Colorado customers of DMEA.")). This proceeding, however, can have no direct

[1] *See* C.R.S. § 24-38.5-102(1)(a).
[2] *See* C.R.S. § 24-38.5-101(1)(f).
[3] DMEA has voted to exempt itself from Commission regulation under C.R.S. § 40-9.5-104. (Compl. ¶ 20).

effect on DMEA's customers' long-term costs under C.R.S. § 24-38.5-101(1)(f). Much like the Commission does not regulate DMEA's resources, it also does not regulate the electric rates DMEA charges its customers, which are instead set by DMEA's Board of Directors.

Under either the standard for intervention as of right or the standard for permissive intervention, therefore, the arguments advanced by CEO are insufficient to support intervention. With respect to intervention as of right, CEO has not shown it has a legally protected right as required by Rule 1401(b). No such right exists with respect to DMEA's intention to pursue renewable energy or lower its members' rates because the Commission has no jurisdiction to adjudicate either of these things. The Commission could grant no relief in this proceeding that would bind DMEA with respect to rates or resources.

Nor has CEO met the standard for permissive intervention, which requires the movant to identify a "claim or defense within the scope of the Commission's jurisdiction." Here, CEO has identified concerns regarding DMEA's rates and facilities, neither of which are within the Commission's jurisdiction as discussed above. Absent such a claim or defense within the Commission's jurisdiction, permissive intervention cannot be granted under Rule 1401(c).

CEO also requests, in the alternative, that it be allowed to participate as an *amicus.* While Tri-State is not in a position to determine whether such participation would be useful to the Commission, to the extent that the Commission allows CEO to participate as an *amicus*, Rule 1200(c) limits CEO to making legal arguments identified in its Motion. Similarly, if CEO is granted *amicus* status, it may not present

public, academic, or policy comments. *See* Rule 1509(b); *see, e.g.*, Proceeding No. 17A-0179T, Decision No. R17-0785 (limiting *amicus* party to legal argument and not allowing it to present public, academic, or policy comments).

As required by Rule 1200(c), CEO indicates in its Motion that if it participates as an *amicus* it will provide legal argument on the jurisdictional issues in this proceeding. (CEO Mot. ¶ 10.) Tri-State objects, however, to CEO's additional request to provide legal argument on any other unspecified "any legal issues that arise or have arisen in this proceeding" as this is inconsistent with the requirements of Rule 1200(c) and would deprive the Commission of the opportunity to determine whether such additional legal argument would be useful. (CEO Mot. at ¶ 10.) CEO should be limited to the arguments specifically identified in its motions consistent with the plain language of Rule 1200(c), which requires a non-party seeking amicus status to "identify the issues that the non-party will address through argument."

Submitted this 28th day of January, 2019.

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